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IN THE

Supreme Court of the United States

October Term, 1966.

No. 1033

AARON DANIEL,

Petitioner,

v.

SKIBS A/S HILDA KNUDSEN and CHRISTIAN HAALAND and BOISE GRIFFIN STEAMSHIP COMPANY, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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v.

SKIBS A/S HILDA KNUDSEN AND CHRISTIAN HAALAND AND BOISE GRIFFIN STEAMSHIP COMPANY, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Aaron Daniel by his attorneys, respectfully petitions that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on November 3, 1966.

OPINIONS BELOW.

The opinion of the Court of Appeals is to be found in 368 F. 2d 179 (C. A. 3, 1966) (page 11, *infra*). This is the final judgment of the United States Court of Appeals for the Third Circuit where judgment was entered for Respondents affirming the judgment of the United States District Court for the Eastern District of Pennsylvania. The opinion of the District Court is to be found in 253 F. Supp. 758 (E. D. Pa. 1966).

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was entered on November 3, 1966 (page 14, *infra*). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

1. Did granting of Judgment notwithstanding the verdict by the trial judge usurp the function of the jury which decided under the evidence that petitioner was involved in the unloading of a vessel and deny petitioner right to trial by jury under Seventh Amendment?

2. Does the warranty of seaworthiness apply to men in the service of a vessel injured on shore but while assisting in the unloading of the vessel?

3. Will essential equipment used by men on shore in connection with unloading procedure be considered vessel's equipment though not physically connected to vessel in any way?

CONSTITUTIONAL PROVISION AND THE STATUTE INVOLVED.

1. Constitution of the United States, Amendment VII:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

2. The Extension of Admiralty Jurisdiction Act, 46 U. S. C. Section 740, the pertinent portion of which reads as follows:

> "The Admiralty and Maritime jurisdiction of the United States shall extend to and include all cases of damage or injury to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

STATEMENT OF THE CASE.

Plaintiff brought an action to recover damages from the owners and operators of the S. S. "CONCORDIA FONN" for injuries sustained on September 29, 1961. Jurisdiction of the District Court was invoked because of the diversity of citizenship between the parties and because of the application of the admiralty law.

The action was tried before the Court and jury and resulted in a verdict for plaintiff in the sum of $10,000, judgment being entered thereon on October 19, 1965.

Defendant's Motion for Judgment N. O. V. was granted on April 28, 1966 and affirmed by the Court of Appeals for the Third Circuit.

This accident involved a cargo of licorice root which was being discharged from the S. S. "Concordia Fonn" at the MacAndrews and Forbes pier, Camden, New Jersey. The cargo, while in the holds of the vessel was owned by MacAndrews and Forbes, manufacturers of licorice (N. T. 174). MacAndrews and Forbes, not the owners of the vessel or its agents, employed Murphy Cook Co., to unload the ship (N. T. 176).

In connection with the unloading, Murphy Cook hired some men in Philadelphia and hired others in Camden. For example, the plaintiff was hired in Camden and assigned to work in a warehouse next to the pier. Joseph Dupree and Earl Wagner, fork lift operators, were hired in Philadelphia, but assigned to work in and about the warehouse. Other men were hired and assigned to work on the ship. Wherever the men were assigned to work, all received the same salary and all worked when the ship was being unloaded. While there were different foremen for each gang on the ship and for the gang in the warehouse, it was shown that Gomez, the warehouse foreman, worked in conjunction and as part of an overall team with the other foreman. He could and would visit the vessel to see how the work there was progressing.

The vessel had been unloading at the pier for 3 days before September 29, 1961 (N. T. 208). W. H. Jones, marine supervisor for MacAndrews and Forbes, stated that each bale weighed about 350 pounds and that about 200 were discharged per hour from each hold.

It was stipulated that bad weather, such as rain, had an adverse and harmful effect upon the bales of licorice root. Testimony further showed that the MacAndrews and Forbes Pier was an open pier without any storage or cover facilities whatsoever (N. T. 199). There was no testimony from Jones that there were any other warehouse facilities available for the cargo.

The procedure which was followed on the day of the accident by Murphy Cook's men was to bring the bales of licorice root out of the hold to land them on a railroad flat car or cars which ran on a track which led from the pier to the warehouse. Certain men assisted in this operation standing on a platform on the pier next to the vessel—which platform had been placed in position by Murphy's fork lift operators using Murphy's fork lift trucks (N. T. 87).

The filled railroad car was taken down the pier to a point in front of the warehouse where the fork lift operators (Murphy Cook's men) would lift it off the car and take it into the warehouse. The railroad car which was operated by a MacAndrews employee would then return to the ship side for another load.

Once the cargo was in the warehouse it was necessary to stack the bales since there was not sufficient room in the warehouse to place the cargo without placing them in tiers or stacking them in some way (N. T. 115, 123, 124).

In order to raise the bales for sacking the Murphy Cook men in the warehouse used a procedure in which a pulley or block is hung to a rafter by what has been termed a "hanger rope." A line fed through the pulley had a set of tongs attached to one end while the other is wound around a "hold and turn motor."

The fork lift operator takes the cargo from the flat car and brings it into the warehouse. Petitioner's job was to hook on the gongs (similar to ice tongs) to the draft and signal the operator of the motor (also a Murphy Cook man) to raise the draft so that other Murphy Cook men working on the piles of bales could stack it.

Petitioner was injured when the hanger rope broke, causing the block to fall and strike him in the chest.

The hanger rope was originally owned by MacAndrews and Forbes but given to Murphy Cook's men, who spliced the rope, for use in this operation. The rope did not break at the splice. The block or pulley used was also owned by Murphy Cook.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court below in the instant case is in conflict with the decisions of the Supreme Court regarding the determination by a jury of the status of an injured worker seeking recovery under the unseaworthiness doctrine, namely, *Seas Shipping Co. v. Sieracki,* 328 U. S. 85; 66 S. Ct. 872, 90 L. Ed. 1099; *Guitterez v. Waterman, S. S. Corp.,* 373 U. S. 206; 83 S. Ct. 1185, 10 L. Ed. 2d 297; *Grimes v. Raymond Concrete Pile Co.,* 356 U. S. 252, 78 S. Ct. 687, 2 L. Ed. 2d 754.

Since the landmark case of *Seas Shipping v. Sieracki, supra,* the protection of the doctrine of unseaworthiness has been made available to longshoremen and other workers who perform the work previously done by members of the crew before division of labor skills made it economically unsound for crew members to perform all such functions.

In *Guitterez v. Waterman S. S. Corp., supra,* this court extended the warranty of seaworthiness to longshoremen injured in the unloading process even if the accident happened upon the pier. The court found that the situation came within the Extension of Admiralty Jurisdiction Act, 46 U. S. C. Sec. 740.

This court has consistently held that the status of a claimant as a crew member so as to maintain recovery under the Jones Act, 46 U. S. C. Sec. 688 was a question of fact or a mixed question of law and fact to be decided by a jury.

In *Grimes v. Raymond Concrete Pile Co., supra,* the court stated:

> "We hold further, however, in disagreement with the Court of Appeals that the petitioner's evidence presented an evidentary basis for a jury's finding whether or not the petitioner was a member of the crew of any vessel."

While the instant action was not a claim under the Jones Act, but a claim under general maritime law, by a longshoreman allegedly doing work formerly done by members of the vessel's crew, it still presents a question of the development and expansion of the admiralty concept of unseaworthiness.

It would indeed seem incongruous for this court to take such protective steps to safeguard a party's right to a jury on the question of crewman status and not to so hold for longshoreman doing crewman's work. See also *Senko v. La Crosse Dredging Corp.*, 352 U. S. 370, 77 S. Ct. 415, 1 L. Ed. 2d 404, and *Texas Co. v. Gianfala*, 350 U. S. 879, 76 S. Ct. 141, 100 L. Ed. 775.

2. The decision of the Court below in the instant case is in direct conflict with the decision of the Ninth Circuit Court of Appeals in *Pope and Talbot, Inc. v. Cordray*, 358 F. 2d 214 in its determination that the taking of cargo from shipside to its place of storage was not employment in the service of the ship and in the unloading process.

This nation has one of the world's largest maritime fleets and its ports and marine facilities are unrivaled in scope. Its maritime workers, longshoremen, ship cleaners, pipefitters, etc., seek certainty of protection under the law in one of the most hazardous industries in our country.

Should taking of cargo from ship's side to a land based warehouse for storage be considered "unloading" on West Coast while not in the East? For this would be the result since in *Pope and Talbot, Inc., v. Cordray, supra*, it was held:

> "The test is, what was the nature of his work? He was performing a service for the ship in the discharge of its cargo. His employer was under contract with the shipowner to take the cargo from the shipside and to put it in a place of storage, and appellee was engaged in the performance of this work. The appellee's work was the work of a longshoreman and he was

entitled to seaworthy gear while he was performing his services."

3. The lower court's dictum concerning the breaking of the rope is also in direct conflict with the decisions of this court regarding the difference in conceptual thinking between an absolute duty to provide a safe place to work under the general maritime law and the theory of negligence under common law.

The lower court finds that the rope that broke was owned by the consignee of the cargo and used in its warehouse and therefore was not part of the ship's tackle or appurtenances which the vessel's owners were required to keep in good workable condition.

Unfortunately, the words of the lower court sound in negligence based upon right and duty of inspecting the rope in question. In *Mitchell v. Trawler Racer, Inc.*, 362 U. S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941, this court put to rest the use of common law negligence concepts when dealing with an unseaworthy condition.

In *Italia Societa v. Oregon Stevedoring Co.*, 376 U. S. 315, 84 S. Ct. 763, 11 L. Ed. 2d 743, it was noted:

> "If the owner engages others to supply the equipment necessary to stevedoring operations, he must still answer to the longshoremen if the gear proves to be unseaworthy."

In a recent decision in the Fifth Circuit Court of Appeals in *Deffes v. Federal Barge Lines, Inc., et al.*, 361 F. 2d 422, it was held that a land based machine used to remove grain from a vessel would be essential equipment in unloading the vessel and failure of such equipment would subject shipowner to liability though it never inspected or controlled the equipment involved.

For the sake of maximum clarity to the industry, it is submitted that true test should be whether the equipment used was reasonably essential in the unloading process and

its use foreseeable. Failure of such equipment would expose to liability the shipowner who has a non-delegable duty to provide proper tools. The shipowner in turn could be protected by a possible indemnity claim against the stevedoring company involved under *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp.*, 350 U. S. 124, 76 S. Ct. 232, 100 L. Ed. 133.

CONCLUSION.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15965

AARON DANIEL,

Appellant

v.

SKIBS A/S HILDA KNUDSEN AND CHRISTIAN HAALAND AND BOISE-GRIFFIN STEAMSHIP COMPANY, INC.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued October 20, 1966

Before MARIS, MCLAUGHLIN and KALODNER, *Circuit Judges.*

OPINION OF THE COURT

(Filed November 3, 1966)

PER CURIAM:

The plaintiff was injured in the course of stacking bales of licorice root in a warehouse belonging to MacAndrews & Forbes Company in Camden, New Jersey. The bales of licorice root, which were owned by MacAndrews &

Forbes and consigned to them, had been discharged from the defendants' vessel, the Concordia Fonn, by two gangs of longshoremen onto flat railroad cars owned by MacAndrews & Forbes and standing on tracks on its pier alongside the vessel. As the cars were loaded they were pulled along the tracks leading from the pier to one of MacAndrews & Forbes' warehouses on shore by an engine owned by MacAndrews & Forbes and operated by one of its employees. The bales were unloaded from the flat cars, brought into the warehouse by forklift trucks and dropped on the warehouse floor. It was at this point that the gang of laborers, of which the plaintiff was a member, which had been hired by Murphy Cook Company, the stevedoring firm which had also provided the two gangs of longshoremen working at ship's side, took the bales over and stacked them in the warehouse. The bales were raised by means of a rope and tongs device rigged through a block suspended from the ceiling by a hanger rope. All this equipment, except the block, was owned by MacAndrews & Forbes. The plaintiff's job was to hook the tongs to a bale and give the signal to raise it. He was injured when the hanger rope supporting one of the lifting devices broke causing the block to fall on him.

Alleging himself to have been a longshoreman engaged in the unloading of the Concordia Fonn the plaintiff sued the defendants as owners of the vessel for damages for his injuries based upon the unseaworthiness of the hanger rope which was claimed to be an appurtence of the vessel. Upon the trial of the case in the district court the jury rendered a verdict for $10,000.00 in favor of the plaintiff. Thereafter upon motion of the defendants the court entered judgment in their favor n.o.v. In directing the entry of judgment n.o.v. District Judge Joseph S. Lord III filed a well reasoned opinion, 253 F. Supp. 758, in which he stated the facts, carefully analyzed the authorities, and concluded that the facts did not support the jury's finding that the plaintiff was engaged in unloading the vessel, because the

unloading ended with the delivery of the cargo to the consignee, MacAndrews & Forbes, on board their flat cars. So holding, he did not pass upon the question whether the rope of MacAndrews & Forbes which broke in the warehouse and caused the plaintiff's injury was an appurtenance of the vessel which was covered by the warranty of seaworthiness. Finding ourselves in complete accord with the reasoning and conclusions of Judge Lord we affirm the judgment for the reasons well stated in his opinion.

We merely add that in our opinion the judgment finds support also in the fact that the rope belonging to the consignee and in its warehouse on shore, the breaking of which caused the plaintiff's injury, could hardly be regarded as a part of the ship's tackle or an appliance appurtenant to the vessel which her owners were required to maintain in good workable condition under their warranty of seaworthiness. Compare Crumady v. The Joachim Hendrik Fisser, 1959, 358 U. S. 423; Thompson v. Calmar Steamship Corporation, 3 Cir. 1964, 331 F. 2d 657; Spann v. Lauritzen, 3 Cir. 1965, 344 F. 2d 204.

The judgment of the district court will be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 15965.

AARON DANIEL,

Appellant

v.

SKIBS A/S HILDA KNUDSEN AND CHRISTIAN HAALAND AND BOISE-GRIFFIN STEAMSHIP COMPANY, INC.

(D. C. Civil No. 30778)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: MARIS, MCLAUGHLIN and KALODNER, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed April 28, 1966, be, and the same is hereby affirmed, with costs.

ATTEST:

IDA O. CRESKOFF,
Clerk.

November 3, 1966.

SUPREME COURT, U. S.
MAR 23 1967
JOHN F. DAVIS, CLERK

IN THE

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AARON DANIEL,

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v.

SKIBS A/S HILDA KNUDSEN and CHRISTIAN HAALAND and BOISE GRIFFIN STEAMSHIP COMPANY, INC.,

Respondents.

BRIEF IN OPPOSITION.

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COUNTERSTATEMENT OF QUESTION INVOLVED.

After cargo which has been transported by water has been unloaded from the ship, transported on rail cars, unloaded from the rail cars onto the floor of the consignee's warehouse and is thereafter being stacked within the warehouse, is an individual injured by reason of the breaking of a rope used in the stacking operation entitled to recover in a suit against the shipowner based solely upon a claim of a breach of the shipowner's warranty of seaworthiness?

COUNTERSTATEMENT OF THE CASE.

We will refer to the parties herein as the shipowner (respondent), plaintiff (petitioner), stevedore (Murphy, Cook & Co.) and consignee (McAndrews & Forbes).

Shipowner's vessel transported a cargo of baled licorice root to consignee's wharf in Camden, N. J. Stevedore was engaged to unload the cargo under a procedure as follows:

Bales removed from the ship's hold were placed upon a landing stage on the dock. From there, the bales were manually tumbled onto pallets on flat rail cars upon the pier. Up to this point the work was performed by stevedore's employees. Ultimate payment for this portion of the work was borne by shipowner in the form of a per ton allowance to the consignee against payable freight.

The rail cars and engine to be mentioned hereinafter were owned by consignee and operated by its employees. When a string of rail cars had been loaded, consignee's employees attached an engine to the cars and hauled them from the pier to a warehouse on shore also owned by the consignee. Within the warehouse, men, including plaintiff, were employed whose job it was to stack the bales of licorice root within the warehouse. These men were also in the temporary employ of the stevedore but under a completely different arrangment for payment. Payment of these men was to be reimbursed to stevedore by consignee. The work of the men in the warehouse was confined entirely to that locale. None of them, including the plaintiff, had any part in the work being performed either on the ship or immediately alongside the ship upon the pier. They worked at the receiving end of the rail track only.

After the rail cars had been pulled from the pier and brought to the warehouse, the bales were unloaded from the flat cars at a point outside the warehouse and brought into the warehouse by fork lift trucks. From the floor of the warehouse they were to be stacked. The procedure was

that a consignee-owned rope was attached to a roof beam within the warehouse. That rope was attached to a block. Fellow employees of plaintiff, all employed by the stevedore on this occasion but pursuant to an arrangement with the consignee for reimbursement of the costs, worked within the warehouse. With the aid of a motor and an "ice-tong" like device, the bales were raised from the floor of the warehouse and stacked.

Plaintiff was injured when the consignee's "hanger" rope attaching the block to a roof beam parted during the stacking operation. In a different action plaintiff sued the consignee who owned the warehouse and the rope involved. In this action he sued only the shipowner. His suit against the shipowner came to trial first. The action against the consignee is still pending and undetermined.

At the trial of plaintiff's suit against shipowner, the defendant meticulously followed the procedures outlined by the Federal Rules. It moved for a directed verdict at the close of the plaintiff's case and at the close of all the evidence. The trial judge reserved ruling and submitted the case to the jury, which returned a verdict in the sum of $10,000 in favor of the plaintiff.

Thereafter, District Judge Joseph Lord, III filed an opinion which, for convenience, is printed as an appendix to this Brief. The District Court granted defendant's rule 50b Motion and entered judgment in favor of the defendant. The District Court's opinion is reported 253 Fed. Sup. 758 and appears as an appendix to this Brief, page 11.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

I. Both the District Court and the Court of Appeals have held that the plaintiff is not within the class of persons who may recover in a suit against the shipowner based solely upon a breach of the warranty of seaworthiness.

We will not affect learning and repeat here the reasons which are so much more cogently expressed by District Judge Lord in his opinion. He there points out the distinction between shipowner's work and consignee's work. The Court of Appeals not only affirmed District Judge Lord's opinion per curiam, but went on to state additional reasons for reaching the same result. Thus plaintiff's case has been carefully considered by two lower Courts, both of which arrived at the same conclusion.

Plaintiff is so far removed from the group to which any Court has extended the not-fault liability of a shipowner that any other holding by the Courts below would have clashed with the decisions and the rationale of the decisions of this Court. *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 66 S. Ct. 872 (1946); *Gutierrez v. Waterman S. S. Corp.*, 373 U. S. 206, 83 S. Ct. 1185 (1963), reh. den. 374 U. S. 858, 83 S. Ct. 1963 (1963); *Reed v. The Yaka*, 373 U. S. 410, 83 S. Ct. 1349 (1963), reh. den. 375 U. S. 872, 84 S. Ct. 27 (1963).

II. In seeking to find something—anything—to make it appear that the present decision is in conflict with some other decision, petitioner has served a potpourri of confusion. Cases involving longshoremen's suits for personal injuries, indemnity actions by shipowner against stevedore and seamen's actions against their employers under the Jones Act have been mixed indiscriminately. They have been stewed without regard to the fact that this Court has made clear the different conceptual approaches which are applicable to each distinct type of action.

While petitioner first asserts "usurpation of trial by jury", it is stated only as a question presented and not supported by reasons or argument. Such brief reference as petitioner makes to the point is at page 8 of the petition, but it hardly supports his reasons for granting the writ. While petitioner claims (petition, page 8) that he should have a jury trial upon the question of his participation in the unloading process because he was "a longshoreman doing crewman's work" and cites *Senko* (352 U. S. 373) and *Texas Co.*, (350 U. S. 879) he does so on a bootstrap premise. He assumes that which both Courts below have decided against him, namely that he was "a longshoreman doing crewman's work".

We call this Court's specific attention to the fact that petitioner cites nothing in the record, for there is nothing, to support the statement that he was "a longshoreman doing crewman's work". As both Courts below have pointed out, he was a warehouseman doing a warehouseman's work in the warehouse of the consignee against whom, if anyone, he has a cause of action. *Senko* and *Texas Co.* both involved situations where there was an evidentiary basis for a jury finding that the individual there involved was performing the work of a member of the ship's crew. Here, petitioner presented no evidence to sustain the proposition that he was a longshoreman removing cargo from a ship or even handling it immediately alongside the ship. To put it in a different context, he was at the other end of the pipeline.

Thus petitioner begs the question when he assumes himself to have been "a longshoreman doing crewman's work".

The District Court's opinion is a very careful and impartial analysis of all of the evidence. The most that evidence would support was that petitioner was doing the consignee's work, not shipowner's work. He was working at the discharging end of a process of transportation on land. The rope which broke and caused the injury was the

property of the consignee. There had been an end to the process of transportation by water.

The decisions below are not in conflict with any decision of this Court. As a matter of fact they are clearly based upon an analysis of the decisions and the rationale of the decisions of this Court. The actionable facts here occurred well beyond the demarcation line which this Court so recently and carefully drew in *Calbeck v. Travelers Ins. Co.*, 370 U. S. 114.

III. In petitioner's search for decisions which, he argues, may be in conflict with the decisions below, he cites to this Court *Pope & Talbot, Inc. v. Cordray*, 258 F. 2d 214, and relies strongly upon it (Petition, page 8).

Petitioner fails to recognize the basic distinction between the case at Bar and the decision of the Court of Appeals for the Ninth Circuit in *Cordray*. Cordray was injured in an accident on board the ship (258 F. 2d 214 at 217, second column). Even if that had not been the essential distinction between that case and this, Cordray's employment was at the filling end of the pipeline, so to speak, whereas petitioner here is at the spilling end of the pipeline and his occupation was even one step removed from the actual discharge at the far end of the pipeline or rail transit of the cargo in question. There is indeed a clear distinction between the breaking of an appliance which is a part of the ship's equipment and the breaking of an appliance which is a part of the consignee's warehouse equipment at the far end of the rail line used to transport the cargo from shipside to consignee's warehouse and stack it therein.

IV. Petitioner's visceral approach to the problem appears, in perspective, to stem from the fact that he was in the temporary employ of a company which has designated itself as a stevedoring company. His is a logic of labels, not of fact. His argument seems to be that everyone in the temporary employ of a firm designating itself as a

stevedoring company is entitled to recover in a warranty of seaworthiness action against the shipowner. If what petitioner calls the "true test" (Petition, page 9, last paragraph) should be that the activity of the person claiming recovery "was reasonably essential" to unloading the ship, it would lead to completely illogical results. The stevedore's employee who had gone to the Custom House to file a Customs Declaration and was injured when the elevator in the Customs House fell would be entitled to recover in a suit against the shipowner because, in one sense of the word, his activity was "essential in the unloading process" and the use of the elevator "foreseeable" (Petition, pages 9-10). Following petitioner's logic, failure of the elevator would "expose to liability the shipowner" because he had a "non-delegable duty to provide proper tools" for the stevedore's employee to get from the first to the tenth floor of the Custom House so that the Customs Declaration could be filed in the proper office.

V. We are completely unable to understand the logic of petitioner's third reason commencing on line three of page 9 of the Petition.

The lower Court did not "find" that the rope which broke was owned by the consignee of the cargo and used in its warehouse. That was the Petitioner's evidence and was uncontradicted. Petitioner is correct when it says that the Courts below, considering this uncontradicted evidence, held that the rope attaching the block to the roof beam in the consignee's warehouse "was not part of the ship's tackle or appurtenances which the vessel's owners were required to keep in good workable condition" (Petition, page 9).

Petitioner then goes on to argue that this decision by the Court below sounds "in negligence based upon right and duty of inspecting the rope in question". He cites *Mitchell v. Trawler Racer, Inc.*, 362 U. S. 539. Petitioner completely misconceives both the holding of the Courts

below and this Court's decision in *Mitchell*. The Courts below in the case at Bar were not discussing anything like the situation which was before this Court in *Mitchell*. They were not talking about "common law negligence concepts". They were speaking of the scope of the shipowner's warranty and the class to whom it extends.

Petitioner quotes (Petition, page 9) some language from this Court's decision in *Italia Societa*, 376 U. S. 315, but he completely overlooks the fact that there, as the quotation demonstrates, this Court was speaking of "the owner" meaning the shipowner. In the case at Bar the shipowner did not engage others to perform the work. The consignee did that. He might have arranged with the stevedore to provide this warehouse labor or he might have arranged with some other contractor to provide this warehouse labor or he might have hired the labor on his own payroll as he had done in the past (R. 26b). Nothing about the agreement under which petitioner was working in the consignee's warehouse had anything to do with shipowner's business. The decisions of the Courts below clearly spell out that whenever this Court has spoken of "the owner" in this type maritime case, it is speaking of the shipowner, not of the owner of a shoreside warehouse.

CONCLUSION.

There is nothing about the decisions below which merits hearing and decision by this Court. The principles of this Court's decision are clear and this case is not encompassed within them. There is no conflict. The Petition should be denied.

Respectfully submitted,

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Appendix.

OPINION.

April 28, 1966.

JOSEPH S. LORD, III, *J.*

On September 29, 1961, the SS "Concordia Fonn", carrying a cargo of baled licorice consigned to MacAndrews & Forbes, was being unloaded at the MacAndrews & Forbes pier in Camden, N. J. The unloading procedure was as follows:

Two twenty-two man gangs of longshoremen, employed by the stevedoring firm of Murphy Cook Co., brought the cargo from the hold of the vessel over the side to a landing stage. From there, the bales of licorice were loaded on railroad flat cars which were on tracks on the pier. Each bale weighed about 350 pounds and about 200 bales per hour were discharged from each of the two holds. As the railroad cars, which were owned by MacAndrews & Forbes, were filled they were pulled on the tracks by an engine, also owned by MacAndrews & Forbes, to a warehouse situated on shore at the end of the pier. The operator of the engine was a MacAndrews & Forbes employe. Thereafter, the movement of the bales was done by employes of Murphy Cook under contract with MacAndrews & Forbes.

Upon reaching the warehouse, the bales were unloaded by fork lift trucks to the floor of the warehouse from where they were stacked. In order to raise the bales for stacking the men in the warehouse used a procedure in which a pulley or block is hung to a rafter by what has been termed a "hanger rope." A line fed through the pulley has a set of tongs attached to one end while the other is wound around a "hold and turn motor." Daniel's job was to hook on the tongs (similar to ice tongs) to the draft and signal

the operator of the motor to raise the draft so that other Murphy men working on the piles of bales could stack them. Daniel was injured when the hanger rope broke, causing the block to fall and strike Daniel in the chest. The hanger rope was owned by MacAndrews & Forbes but it had been given to Murphy's men who spliced the rope for use in this operation. The block or pulley used was owned by Murphy Cook.

Licorice is a perishable commodity, subject to damage by rain and it was therefore necessary to have it under cover. The pier was inadequate to contain the bales as they were unloaded, and, in addition, there would not have been enough room for them in the warehouse unless they were stacked.

Murphy Cook had agreed with MacAndrews & Forbes to supply the longshoremen who worked on the ship and on the landing stages immediately adjacent to the ship, and also the men working in the warehouse. As to the former, the ship had agreed with MacAndrews & Forbes to make an allowance against the freight bill for the costs which MacAndrews & Forbes incurred to Murphy Cook. No such allowance was made for the men working in the warehouse, and defendant had nothing to do with that arrangement.

Plaintiff's suit against the vessel is based solely on an asserted breach of the warranty of seaworthiness which plaintiff claims extends to him. We left it to the jury to determine whether plaintiff was engaged in unloading the vessel and hence covered by the warranty. The jury found for the plaintiff in the amount of $10,000. Defendant has moved for judgment notwithstanding the verdict, or in the alternative, for a new trial.

I.

This case presents the problem of whether the already broad coverage of the warranty of seaworthiness should be further extended. It can no longer be questioned, of course, that a longshoreman engaged in the service of the vessel is

entitled to the benefits of the warranty. *Seas Shipping Co., Inc. v. Sieracki,* 328 U. S. 85 (1946). However, this broad statement of the rule is but a starting point for the solution of particular cases. Lurking within it are unexplored areas of liability or non-liability whose borders are difficult of exact discernment. The best starting place is at the beginning, *i.e.,* the basis of the warranty of seaworthiness. In *Reed v. Steamship Yaka, etc., et al.,* 373 U. S. 410 (1963), the Court referred to the holding in *Sieracki* which extended the warranty to longshoremen and said at page 413:

> "* * * In doing so, we noted particularly the hazards of marine service, the helplessness of the men to ward off the perils of unseaworthiness, the harshness of forcing them to shoulder their losses alone, and the broad range of the 'humanitarian policy' of the doctrine of seaworthiness, which we held not to depend upon any kind of contract. * * *"

Thus, it would appear that originally the warranty evolved because of the peculiar differences between shore work and sea work, it being thought that the hazards involved in the two were different and hence required different modes of protection. The longshoreman, so long as he is doing ship's work, has now become the beneficiary of the doctrine originally devised for the protection of his sea-going brothers.

It has been frequently stated that the work of unloading is ship's work, traditionally performed by members of the crew, and that a longshoreman engaged in unloading is entitled to the benefit of the warranty. *Seas Shipping Co. v. Sieracki,* 328 U. S. 85 (1946); *Crumady v. "Joachim Hendrick Fisser,"* 358 U. S. 423 (1959). The longshoreman who is working in the hold hooking on to cargo, or the longshoremen working on deck guiding it or operating the cargo winches pose no real problem. Nor is there any longer a problem where a longshoreman, a member of the same gang working aboard the ship, is incidentally on shore doing a

job that is part of an unbroken sequence of getting the cargo from ship to shore.

Plaintiff argues that because of the large number of bales of licorice unloaded per hour in relation to the small capacity of the pier, the perishable nature of the cargo, the necessity of removing the cargo to a covered repository, and the need to stack the bales in that repository, plaintiff was participating in the unloading of the ship. We think, however, that merely to characterize uncritically plaintiff's work as part of "unloading" and therefore to hold that he must be covered by the warranty misses the boat. To so hold would be to impose a semantic liability, and the logic of words must give way to the logic of reality. It is necessary to examine what part plaintiff's work played in the unloading process. In *Grumady v. "Joachim Hendrik Fisser"*, 358 U. S. 423 (1959), the Court said, at page 426:

> "We held in Seas Shipping Co. v. Sieracki, 328 U. S. 85, 95, 90 L. ed. 1099, 1106, 66 S. Ct. 872, that stevedores, though intermediately employed, are, when performing 'the ship's service,' entitled to the same protection against unseaworthiness which members of the crew doing the same work would receive. And see Pope & Talbot, Inc. v. Hawn, 346 U. S. 406, 98 L. ed. 142, 74 S. Ct. 202. The work of loading and unloading is historically 'the work of the ship's service.'" Seas Shipping Co. v. Sieracki, *supra* (328 U. S. at 96). * * *"

It is possible to conceive of an almost limitless variety of situations in which a worker may make some contribution to the discharge of the vessel, and yet not be considered as doing the ship's work. Thus, if the pier area adjacent to the vessel were inadequate to contain the cargo and the consignee engaged a trucker to haul it away, the trucker would be contributing to the completion of the unloading process. However, we cannot believe that he would be held covered by the seaworthiness warranty. Again, if the cargo were taken from the hold of the vessel and placed

in railroad cars, which, in turn were pulled away by a railroad crew, we think the warranty would not extend to the railroaders. In *Thompson v. Calmar Steamship Corporation,* 216 F. Supp. 234 (E. D. Pa. 1963), *aff'd* 331 F. 2d 657 (C. A. 3, 1964), Judge (now Circuit Judge) Freedman said, at page 238:

> "* * * Plaintiff was not a member of a railroad crew which brought a railroad freight car on to the pier. He was, on the contrary, a member of a longshoremen's gang engaged in loading a vessel, and in the course of doing so it fell to him to participate in an operation on land, but one intimately a part of the use of the ship's equipment, i.e. to bull winch and the bull line. * * *"

Similarly, in *Hagans v. Ellerman & Bucknall Steamship Company,* 318 F. 2d 563 (C. A. 3, 1963), plaintiff was a member of the twenty-two man longshore gang which was "working the ship," *i.e.,* taking the cargo from the hold. Again, it fell to plaintiff to participate in an operation on land,—pushing the trucks into which the cargo had been loaded from the ship to a covered portion of the pier. Plaintiff was held covered by the warranty. In *Spann v. Lauritzen,* 344 F. 2d 204 (C. A. 3, 1965), *cert. denied,* 15 L. Ed. 2d 348 (1965), a cargo of nitrate was being unloaded. It was taken from the hold and dumped into a shore-side hopper. Plaintiff again was a member of the unloading crew and his job was to operate the hopper. He was injured as a result of a defective handle. Recovery for unseaworthiness was permitted.

Running throughout the cases [1] permitting recovery for land-suffered injuries are common themes:

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1. *Gutierrez v. Waterman Steamship Corp.,* 373 U. S. 206 (1963); *Hagans v. Ellerman & Bucknall Steamship Company,* 318 F. 2d 563 (C. A. 3, 1963); *Thompson v. Calmar Steamship Company,* 331 F. 2d 657 (C. A. 3, 1964); *Huff v. Matson Navigation Company,* 338 F. 2d 205 (C. A. 9, 1964); *Spann v. Lauritzen,* 344 F. 2d 204 (C. A. 3, 1965); *Litwinowicz v. Weyerhauser Steamship Company,* 179 F. Supp. 812 (E. D. Pa., 1959).

(1) The plaintiff was a member of the actual unloading gang whose duties, as a part of the work that his gang was doing, incidentally took him ashore. Here, however, plaintiff was not a member of the longshore gang. It is true that the test of coverage is status, not situs. *Di Salvo v. Cunard Steamship Co., Ltd.*, 171 F. Supp. 813 (S. D. N. Y., 1959). Plaintiff's status here is no different from that of any shore based worker handling what was at one time ship's cargo. He is one and the same as the railroader referred to in *Thompson* as distinguishable from the members of the longshore gang.

(2) The sequence of movement was unbroken by any act of the consignee. Here, however, the cargo had left the hands of the ship and of those to whom the ship had delegated its work of unloading, the longshoremen. The licorice had become the responsibility of the consignee. *Calcot, Ltd. v. Isbrandtsen Company*, 318 F. 2d 669 (C. A. 1, 1963). The bales of licorice were taken from the hold, were placed on flat cars owned by the consignee, pulled by an engine owned by the consignee and operated by the consignee's employe. When they arrived at the warehouse, they were unloaded by employes of Murphy Cook through an agreement between Murphy Cook and the consignee. In *Spann*, the situation was far different. The operation of removing the nitrate from the hold, dumping it into the hopper and thence into the trucks was a continued, uninterrupted sequence. The consignee in no way participated. So, too, in *Hagans* there was no intervention of the consignee between the departure of the bags of sand from the hold and their arrival in the warehouse.

These differences, we think, are critical. While plaintiff's work may have contributed to the unloading process in a philosophical sense, it was not unloading in the sense that it was a part of the ship's work. We are aware that the recent trend of decisions in this Circuit and in the Supreme Court has been to widen the ambit of seaworthiness coverage. However, there has to be an end somewhere of

the unloading process in the sense of liability-imposing ship's work. "Clearly the maritime jurisdiction extended to the act of reaching into the vessel and removing cargo. Such removal, having a beginning, had to have an end." *Spann v. Lauritzen,* 344 F. 2d 204, 206 (C. A. 3, 1965). The plain implication of *Spann* is that the unloading ended at the hopper, including the emptying of the hopper so that its part in the unloading process could continue. Whether or not the driver of the truck that received the nitrate would be covered, plaintiff's work here was even further removed. We think the removal, or unloading, ended with the delivery of the cargo to the consignee.

There are other reasons for our conclusion.

(1) As pointed out above, the basis for the development of the warranty was to protect against maritime hazards those persons exposed to such hazards who are unable to protect themselves from the perils involved. The plaintiff here was completely shore-based. His work was ashore and he had no contact, remote or otherwise, with the ship. There is no more need for the development of a protective shield for those in plaintiff's then occupation than there is for those engaged in any other industrial occupation. Plaintiff was subject to no particular maritime hazard, nor indeed, to any hazard that the ordinary warehouse worker would not encounter.

(2) The basis for the extension of the warranty to longshoremen seems to be that the vessel owner cannot escape liability by hiring others to do its work and that it is immaterial that the owner seeks to have its work done by a more modern division of labor. "Historically the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew * * *. That *the owner*[2] seeks to have it done with the advantages of more modern divisions of labor does not minimize the worker's hazard and should not nullify his

2. Emphasis in this paragraph ours.

protection." *Seas Shipping Co., Inc. v. Sieracki,* 328 U. S. 85, 96 (1946). "Not *the owner's* consent to liability, but *his* consent to performance of the service defines its boundary." *Ibid.* The liability "extends to those who render it with *his* consent or by his arrangement." *Ibid.,* at page 95. "If *the owner* engages others who supply the equipment necessary for stevedoring operations he must still answer to the longshoremen if the gear proves to be unseaworthy." *Huff v. Matson Navigation Company,* 338 F. 2d 204 (C. A. 9, 1964).

The most significant difference between this case and all that have gone before it, so far as our research reveals, is that here the owner did not engage either the stevedore or its employes to do the work being performed by plaintiff, although it did, in effect, engage those actually working the ship. The consignee, with the ship's agreement, engaged Murphy Cook to provide a twenty-two man gang to bring the cargo from the vessel's hold to the pier. However, defendant made an allowance against the freight bill for the cost of this longshore labor. On the other hand, the consignee arranged directly with Murphy Cook for the labor in plaintiff's gang. The ship made no allowance for this cost and had nothing whatsoever to do with the arrangement. The scope of the owner's liability cannot be constricted by delegation of *its* work but here there was no delegation of the ship's work by the ship; the delegation, if any, was by MacAndrews & Forbes. *The owner* did not seek to have this work done by others; *the owner* did not seek the advantages of more modern divisions of labor; *the owner* did not engage others; plaintiff was not employed by *the owner's* consent or arrangement. Certainly, to extend the warranty to those with whom the owner had no connection whatsoever would be at least unprecedented, and we think unwarranted.

II.

In *Spann v. Lauritzen,* 344 F. 2d 204 (C. A. 3, 1965), the court directed its attention first to the determination

of whether or not plaintiff was engaged in the service of the vessel, concluded that he was, and was therefore entitled to the warranty of seaworthiness. It then became necessary to consider whether he was injured by a defect in an "appurtenance" of the ship, for unseaworthiness only applies to the ship and its appurtenances. The court concluded that the hopper was an appurtenance because "it was an essential part of the unloading process." *Ibid.*, page 209. It seems to us that we do not here need to reach the second inquiry. Having determined that plaintiff was not in the service of the vessel, it follows that he was not covered by the warranty of seaworthiness. In this posture, even if the injury-causing instrumentality was an appurtenance, there would be no liability absent a negligent breach of duty. In short, the character of the rope as an appurtenance is moot.

Defendants' motion for judgment will be granted.

ORDER.

AND NOW, April 28, 1966, it is ORDERED that the defendants' motion for judgment n.o.v. be and it hereby is granted.

By THE COURT

J.